

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1440

To be argued by
HUGH W. CUTHBERTSON

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1440

UNITED STATES OF AMERICA,

Appellee,

—v.—

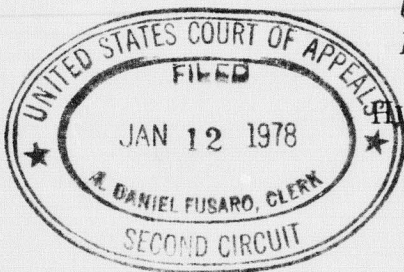
VALDEMAR DA SILVA PEREIRA,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

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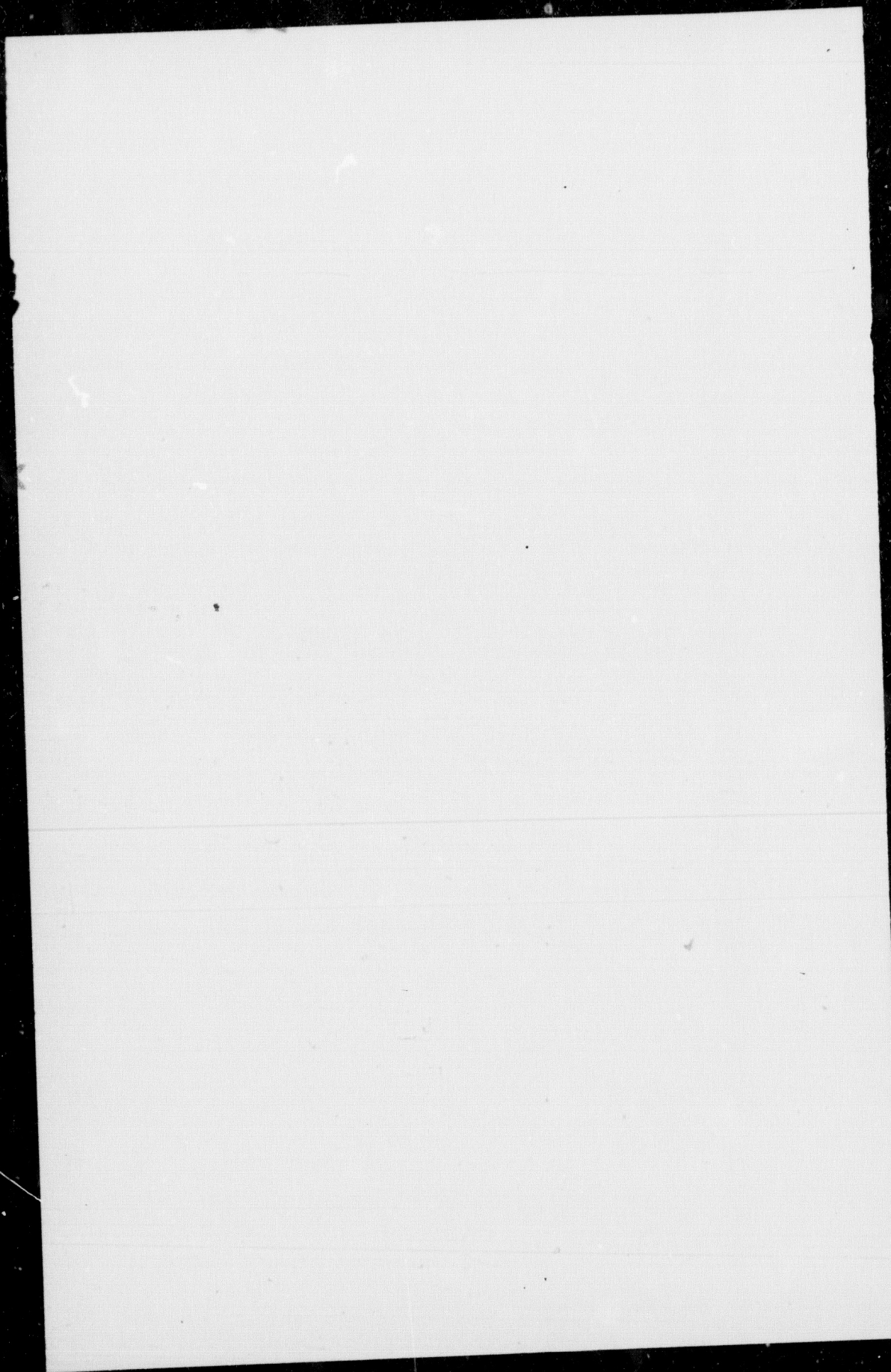
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Docket No. 77-1440

UNITED STATES OF AMERICA,

Appellee,

—v.—

VALDEMAR DA SILVA PEREIRA,

Appellant.

BRIEF FOR THE APPELLEE

Issue Presented

Whether an alien, during a criminal prosecution under 8 U.S.C. § 1326 for unlawful reentry after deportation, may collaterally attack his original order of deportation?

Statement of the Case

This is an appeal from a judgment of conviction in the United States District Court for the District of Connecticut (Daly, J.) on October 20, 1977, after the appellant, Valdemar Da Silva Pereira, entered a plea of guilty on September 20, 1977, at which time he reserved with the Government's consent his right to appeal the court's previous denial of his motion to dismiss the indictment.

On June 3, 1977, a grand jury sitting in Hartford, Connecticut, returned a one-count indictment (Criminal

No. N-77-72) charging Pereira with unlawfully re-entering the United States, in violation of Title 8, United States Code, Section 1326. Specifically, the indictment charged Pereira with being an alien who had been arrested and deported from the United States on April 25, 1975, and who was found in the District of Connecticut on May 16, 1977, without first having obtained the advance consent of the Attorney General.

On June 9, 1977, counsel was appointed and Pereira entered a plea of not guilty. On July 15, 1977, Pereira filed a motion to dismiss the indictment which was denied by the court (Zampano, J.) after a hearing on September 6, 1977. On September 19, 1977, Judge Zampano granted Pereira's motion to recuse and the case was transferred to Judge Daly.

On September 20, 1977, Pereira changed his plea to guilty while reserving his right to take this appeal. Pereira was sentenced on October 20, 1977, to the custody of the Attorney General for a period of one year, the execution of which was stayed pending this appeal.

Notice of appeal to this Court was filed on October 27, 1977.

Statement of Facts

Pereira was admitted to the United States from Portugal with an immigrant visa for permanent residence on January 16, 1960, at New York City. On March 26, 1965, Pereira was convicted upon his plea of guilty in the Superior Court of Connecticut of three counts of statutory burglary, two counts of theft and one count of escape from custody. Pereira, who was represented by counsel at each stage of the state court proceedings, received an aggregate sentence of not less than two years' imprisonment and not more than seven.

As a result of this conviction, the Immigration and Naturalization Service ordered Pereira deported on December 7, 1965, pursuant to 8 U.S.C. § 1251(a)(4).¹ The Service's order was executed on September 2, 1966, by returning Pereira to Portugal.

On March 2, 1968, Pereira illegally reentered the United States as a stowaway aboard the vessel SS United States. As a result of deportation hearings held on January 26, 1970 and February 10, 1970, Pereira was again ordered deported under the continued authority of his original deportation order. See 8 U.S.C. § 1252(f). This order of deportation was not executed, however, inasmuch as Pereira was prosecuted criminally in the District of Connecticut under 8 U.S.C. § 1326 for his illegal reentry. On June 27, 1970, Pereira was convicted of this offense and was sentenced by Judge Zampano to the custody of the Attorney General for a period of two years. Upon his parole from this sentence, Pereira was deported on June 28, 1971.

Thereafter, Pereira attempted to reenter the United States as a stowaway on December 28, 1971, in Baltimore, Maryland. He was subsequently prosecuted in that district as a stowaway under 18 U.S.C. § 2199 and con-

¹ This section provides that an alien is deportable who is convicted of a crime involving moral turpitude committed within five years after entry and who is sentenced to confinement therefor for a period of at least one year. Three counts of the six-count information to which Pereira entered pleas of guilty charged offenses committed within five years of his entry. This section also provides, however, that an alien is deportable "who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial[.]" The information charged at least two separate schemes of criminal misconduct.

victed upon his plea of guilty on February 23, 1972. Pereira was sentenced to time served and remanded for deportation. Prior to being deported, however, Pereira was recommitted on March 19, 1972, to the Federal Correctional Institution in Danbury, Connecticut for a parole violation, stemming from his conviction and sentence in the District of Connecticut on June 27, 1970. Pereira was subsequently deported on November 7, 1972.

Pereira again illegally reentered the United States on May 29, 1973, as a stowaway in Boston, Massachusetts. On April 25, 1975, he was deported for the fourth time. This deportation, as was his second deportation in 1971, was based upon the continued authority of his original order of deportation in 1965.

Pereira most recently reentered the United States on December 22, 1975, again as a stowaway. He was apprehended on May 16, 1977, in the District of Connecticut and ordered deported on May 26, 1977. This order, however, was not executed in view of the present prosecution and was effectively stayed upon the court's sentence of one year. *See* 8 U.S.C. § 1252(h).

ARGUMENT

An alien, during a criminal prosecution under 8 U.S.C. § 1326 for unlawful reentry after deportation, may not collaterally attack his original order of deportation.

Pereira moved to dismiss the indictment in this case on the ground that an indispensable part of the Government's case was predicated upon his conviction in state court in 1965, which, he asserted, was unconstitutionally obtained under the principles of *Boykin v. Alabama*, 395 U.S. 238 (1969). Pereira placed primary reliance for

his position upon the opinion in *United States v. Megura*, 394 F. Supp. 246 (D. Conn. 1975), in which the court dismissed an indictment charging a violation of 18 U.S.C. § 922(a)(6), making it an offense to make a false statement in connection with the acquisition of a firearm, on the ground that the state court conviction which formed the predicate for the federal charges was constitutionally defective under *Boykin*. Pereira claimed that the Government's prosecution under 8 U.S.C. § 1326 was predicated upon his conviction in state court, because this conviction formed the basis of his initial deportation in 1966 and served as a continuing reason by operation of 8 U.S.C. § 1252(f) for his subsequent deportations. His claim was, in essence, that none of his deportations were valid.

Judge Zampano, however, did not reach the merits of Pereira's claim, for he ruled that Pereira could not make during this prosecution what amounted to a collateral attack upon his deportation order.² This ruling was sound and is well-supported by decisional law. See *United States v. Gonzalez-Parra*, 438 F.2d 694 (5th Cir. 1971), *cert. denied*, 402 U.S. 1010 (1972); *Arriaga-Ramirez v. United States*, 325 F.2d 857 (10th Cir. 1963); *United States v. Mohammed*, 372 F. Supp. 1048 (S.D.N.Y.

² Pereira devotes a substantial portion of his argument on appeal (Brief, pp. 6-9, 15-19) to the merits of his claim below. Judge Zampano, however, did not reach the merits of his claim and they are, therefore not before this Court. It may, nevertheless, be useful to note that a majority of those circuits which have most recently considered substantially the same issue that was before the court in *Megura* have ruled to the contrary. See *United States v. Allen*, 556 F.2d 720 (4th Cir. 1977); *United States v. Graves*, 554 F.2d 65 (3d Cir. 1977) (*en banc*); *United States v. Ransom*, 545 F.2d 481 (5th Cir.), *reh. denied*, 547 F.2d 574 (1977); *Cassity v. United States*, 521 F.2d 1320 (6th Cir. 1975).

1973); *United States v. Bruno*, 328 F. Supp. 815 (W.D. Mo. 1971).

It is clear, we submit, that Congress intended to bar collateral attacks on deportation orders in prosecutions under 8 U.S.C. § 1326. The Immigration and Nationality Act, 8 U.S.C. § 1105a, sets forth a comprehensive scheme for the judicial review of deportation orders. § 1105a(c) provides that no court may review an order of deportation if the alien has not exhausted his administrative remedies or if he has already departed from the United States following the issuance of the order. An alien who is ordered deported pursuant to the decision of a special inquiry officer may take an appeal as a matter of right to the Board of Immigration Appeals. 8 C.F.R. § 242.21 (1977). One who is unsuccessful in this appeal may obtain judicial review in several ways. First, if the alien is in custody pursuant to the order, review may be obtained by a habeas corpus proceeding. 8 U.S.C. § 1105a(a)(9). Second, whether he is in custody or not, § 1105a(a) accords him the right to judicial review in a federal court of appeals. § 1105a(a)(16) provides that defendants in certain criminal prosecutions based upon deportation orders may obtain pretrial judicial review of those orders. This section, however, limits such review to prosecutions under 8 U.S.C. §§ 1252(d) and (e). It does not provide for such review under § 1326. Finally, § 1105a(a) expressly provides that these procedures shall be the "sole and exclusive" way to obtain judicial review of final orders of deportation. The statutory scheme itself, therefore, foreclosed Pereira from obtaining review of his original order of deportation during the prosecution below. See *United States v. Gonzalez-Parra*, *supra*, 438 F.2d at 697.

Pereira's attempt to review and determine the validity of the conviction underlying his original order of deportation is analogous, we submit, to the question of whether an escaped prisoner may contest the lawfulness of his underlying conviction during a prosecution for

escape under 18 U.S.C. § 751. In those cases, however, it has uniformly been held that the validity of an escapee's underlying conviction is of no legal consequence. See *United States v. Cluck*, 542 F.2d 728, 732 (8th Cir.), *cert. denied*, 429 U.S. 986 (1976); *United States v. Smith*, 534 F.2d 74 (5th Cir. 1976), *cert. denied*, 429 U.S. 1100 (1977); *United States v. Allen*, 432 F.2d 939 (10th Cir. 1970); *United States v. Haley*, 417 F.2d 625 (4th Cir. 1969); *Lucas v. United States*, 325 F.2d 867 n.2 (9th Cir. 1963) and cases cited therein; *United States v. Jerome*, 130 F.2d 514, 519 (2d Cir. 1942), *rev'd on other grounds*, 318 U.S. 101 (1943); *United States v. Franklin*, 313 F. Supp. 43 (S.D. Ind. 1970), *aff'd*, 440 F.2d 1210 (7th Cir. 1971). These decisions stand for the proposition that the validity of the underlying conviction is not an element of the offense of escape, for the statute forbids escape not only to those properly in the custody of the Attorney General but to all who are confined, without mention of the propriety of the confinement. Similarly, 8 U.S.C. § 1326 proscribes a deported alien from being found in the United States without any mention of the propriety of his deportation, unless he has obtained the advance consent of the Attorney General. The validity of Pereira's deportation is thus not an element of the offense of illegal reentry after deportation and, conversely, any alleged irregularity in the deportation cannot provide a defense to this charge. See *United States v. Bruno*, *supra*, 328 F. Supp. at 825.

While the Third, Seventh and Ninth Circuits would allow some collateral review of a deportation order in a criminal prosecution under 8 U.S.C. § 1326, *United States v. Gasca-Kraft*, 522 F.2d 149 (9th Cir. 1975); *United States v. Bowles*, 331 F.2d 742 (3d Cir. 1964); *United States v. Heikkinen*, 221 F.2d 890 (7th Cir. 1955), *opinion after retrial*, 240 F.2d 94 (1957), *rev'd on other grounds*, 335 U.S. 273 (1958), Judge Metzner, of the Southern District of New York, noted the split in authority among

the circuits on this issue³ before concluding that a defendant was foreclosed under these circumstances from collaterally attacking his original order of deportation. *United States v. Mohammed*, *supra*. Judge Metzner, moreover, reached this decision in the face of the government's position that the defendant *could* raise the invalidity of his prior deportation as a defense to the charge under § 1326. The decisions of Judge Metzner and Judge Zampano stand as the only authority in this circuit on this question.⁴

The one glaring fact, which Pereira does not address, is that on December 22, 1975, after having been deported

³ *United States v. Gasca-Kraft*, *supra*, was not decided until after Judge Metzner's decision. In this regard, although the decisions in *Gonzalez-Parra*, *Arriaga-Ramirez*, *Mohammed* and *Bruno* all preceded the opinion in *Gasca-Kraft*, the Ninth Circuit made no mention at all of these decisions. Instead, it relied upon its own prior decisions and the decisions in *Bowles* and *Heikkinen*. On the other hand, the decisions in *Gonzalez-Parra*, *Mohammed* and *Bruno* took full cognizance of the opinions then in existence upon which Pereira now relies. Indeed, Chief Judge Becker, writing for the court in *Bruno*, gave the opinions in *Bowles* and *Heikkinen* thoughtful treatment before concluding that a court could not review in a prosecution under § 1326 the validity of a conviction underlying an order of deportation. 328 F.Supp. at 824. In *Bruno*, moreover, as here, the defendant sought collateral review of his deportation order on the grounds that the conviction on which it was based was invalid because his guilty plea was involuntary.

⁴ While this court has held that an alien may not challenge the validity of a prior order of deportation during a civil deportation proceeding to avoid being deported for illegally re-entering the United States, *United States ex rel. Bartsch v. Watkins*, 175 F.2d 245, 247 (2d Cir. 1949), the Supreme Court, in *United States v. Spector*, 343 U.S. 169, 172 (1952), specifically left open the question of whether the validity of a deportation order could be judicially reviewed in a criminal proceeding based thereon.

on four previous occasions and prosecuted and convicted twice, he made the conscious and deliberate decision to violate the law once more by reentering the United States. There is no question that so long as Pereira's previous order of deportation was outstanding, he had no right to reenter the United States without permission. *United States ex rel. Bartsch v. Watkins, supra.* Pereira was, in fact, excludable from the United States on two grounds—first, under 8 U.S.C. § 1182(a)(9), he was an alien who had been convicted of a crime involving moral turpitude; and, secondly, under 8 U.S.C. § 1182(a)(17), he was an alien who had been arrested and deported. Pereira's decision to reenter as a stowaway totally ignored the avenues which were available to him for gaining *lawful* reentry. Thus, there is nothing in the record and no claim made by Pereira to suggest that he in any way attempted to seek relief on the state level. For example, there is no reason why Pereira could not have resorted to State declaratory relief under § 52-29 of the Connecticut General Statutes. Similarly, there is no reason why Pereira could not have sought a pardon and, if successful, thereafter made application to have his conviction erased. See Connecticut General Statutes, §§ 18-24a *et seq.* and 54-90. Although Pereira was advised both orally and in writing upon his deportation on April 25, 1975, that should he wish to return to the United States, he must write to either the Immigration and Naturalization Service's office in Hartford, Connecticut or to the American Consular Office nearest his residence abroad regarding how to obtain permission to return, there is no record of his having done so.⁵ Assuming that Pereira had been unsuccessful in obtaining state relief, he could have nevertheless made application under 8

⁵ Pereira was also advised at this time that his reentry without permission would constitute a violation of 8 U.S.C. § 1326 and could result in his imprisonment for two years and a fine of \$1,000.00.

U.S.C. § 1182(h) and 8 C.F.R. § 212.7 (1977) for a waiver of his excludability from this country under 8 U.S.C. § 1182(a)(9). In addition, notwithstanding his previous deportations, Pereira could have made application for the consent of the Attorney General to reapply for admission. 8 C.F.R. § 212.2 (1977). None of these lawful channels for readmission to the United States were, however, pursued. Thus, as Judge Zampano observed (App. 25),* although his decision did not turn upon equitable considerations, they are noticeably lacking in the case at bar.

The decision below is legally and equitably sound. 8 U.S.C. § 1105a provides in comprehensive fashion for various forms of review of deportation orders during both civil and criminal proceedings. It does not, however, provide for the review of such orders in prosecutions under § 1326 for illegal reentry after deportation. That the Government need only prove in such cases the fact, and not the lawfulness, of an alien's prior deportation, is amply supported by the decisional law.⁶

* References marked "App." refer to the appendix to Pereira's brief on appeal.

⁶ The Government did, of course, contend below that Pereira's deportation was lawful. In view of the court's ruling, however, this issue was not reached.

CONCLUSION

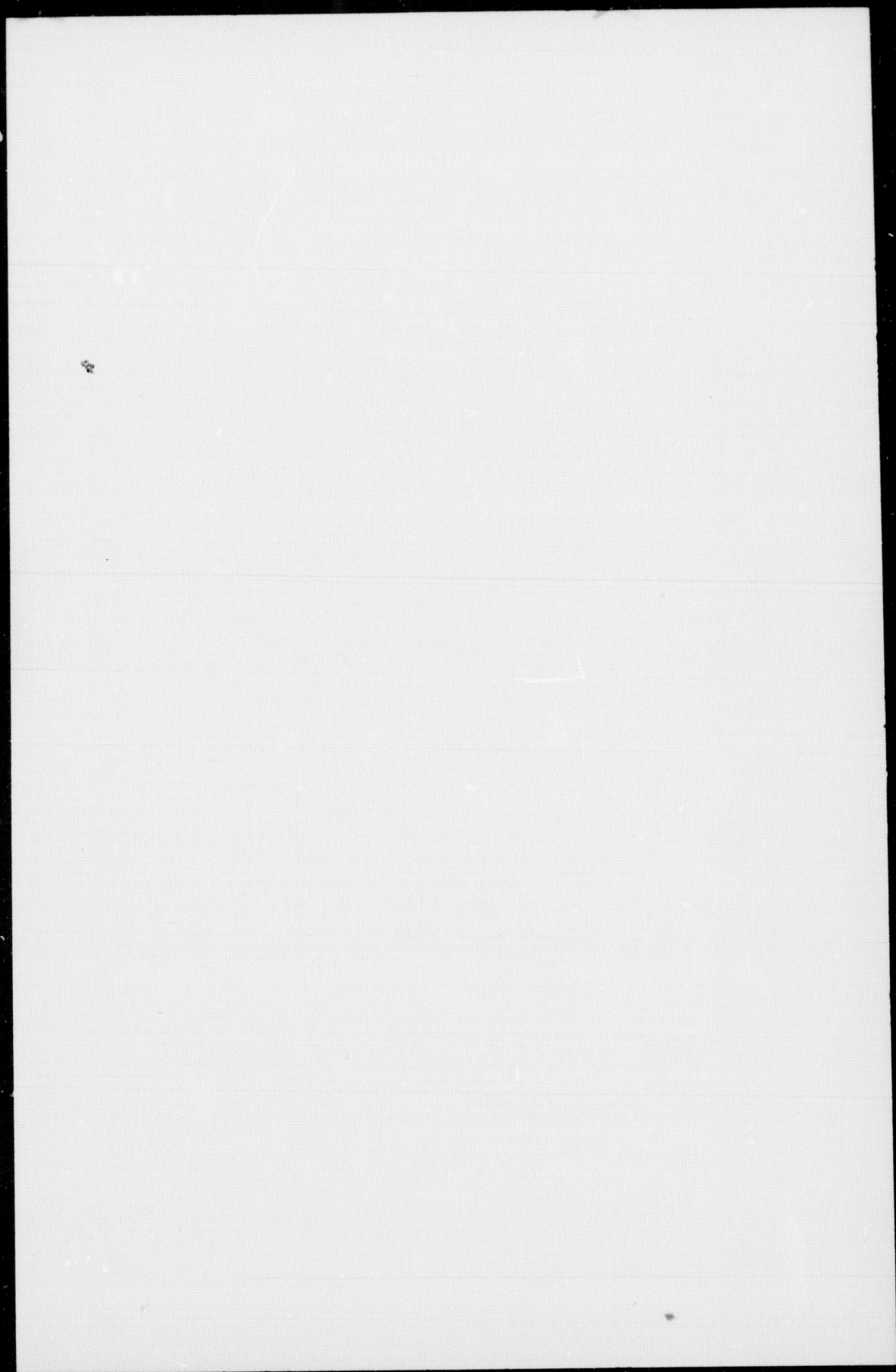
For all of the foregoing reasons, Judge Zampano properly denied Pereira's motion to dismiss. The judgment of conviction should be affirmed.

Respectfully submitted,

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VALDEMAR DaSILVA PEREIRA,

Appellant

AFFIDAVIT OF SERVICE BY MAIL

Albert Sensale, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 914 Brooklyn Avenue,
Brooklyn, New York

That on the 12 day of January, 1978, deponent served the within Brief
upon Peter Goldberger, Esq., Assistant Federal Public Defender, 770 Chapel Street,
New Haven, Connecticut 06510

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Sworn to before me,

Albert Sensale

This 12th day of January, 1978

PATRICIA D. O'HARA, Notary Public
State of New York, No. 31-4854087
Qualified in New York County
Cert. Filed in Kings County
Commission Expires March 30, 1979

Patricia D. O'Hara

